Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
BellSouth Corporation's Petition	)	
For Waiver of Tariffing and Price	)	WC Docket No. 05-277
Cap Rules and of Accounting	)	
Requirements	)	

REPLY COMMENTS OF BELLSOUTH CORPORATION

I. INTRODUCTION AND SUMMARY

BellSouth Corporation ("BellSouth"), on behalf of its wholly owned affiliates, hereby files its reply comments in support of BellSouth's Petition for Waiver in the above-referenced proceeding. Of the four parties that submitted comments in response to the Petition, three – Qwest Communications International, Inc. ("Qwest"), Verizon Telephone Companies ("Verizon"), and SBC Communications, Inc. ("SBC") – support the relief that BellSouth is seeking.[1]

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[1] *See* Qwest Comments at 7 (requesting "that the Commission grant BellSouth's waiver petition ..."); Verizon Comments at 1 (same). While agreeing with BellSouth that "it makes no sense to impose dominant carrier regulation on BOC long distance services," SBC recommends that, in lieu of granting BellSouth's petition, the Commission should "rule at the earliest possible date that BOCs are nondominant in their provision of interstate interexchange services irrespective of whether they provide those services outside of a section 272 affiliate." SBC Comments at 1 & 5-6. BellSouth certainly would have no objection to the Commission's rendering such a ruling if it did so before BellSouth's Section 272 structural separation requirements sunset for BellSouth in its region on December 19, 2005. However, absent such a ruling, the Commission should grant BellSouth's Petition, particularly since doing so would not prevent the Commission from resolving the broader issues in its pending rulemaking. *See Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements,* WC Docket No. 02-112, Notice of Proposed Rulemaking, 17 FCC Rcd 9916 (2002) ("*272 Sunset NPRM*").

The only party filing comments opposing BellSouth's Petition was Sprint Nextel Corporation ("Sprint"). Although Sprint argues that the tariffing, price cap, and accounting rules from which BellSouth seeks a waiver are necessary to "protect[] consumers and the competitive marketplace," such arguments are misguided. The rules in question do not apply to any long distance provider today, and they should not apply to BellSouth after the sunset of Section 272. Equally misguided are Sprint's attempts to justify the continued imposition of Section 272 structural separation requirements after sunset. Section 272 structural separation requirements are not "fundamentally the same requirements" with which Sprint and other incumbents have to comply, nor are they necessary to protect long distance competition, as Sprint alleges. BellSouth has met the standards for a waiver, and the Commission should grant the Petition, notwithstanding Sprint's claims to the contrary.

II. DISCUSSION

A. The Rules For Which BellSouth Seeks A Waiver Are Not Necessary To Protect Consumers Or Ensure Long Distance Competition.

Sprint endorses dominant carrier regulation, claiming it is "long-standing" and "market-protecting."[2] But Sprint does not bother explaining how that can be in the long distance market when no carrier, including Sprint, is subject to dominant carrier regulation today. Furthermore, Sprint has no answer to the Commission's determination that dominant carrier regulation, particularly the tariffing requirements, are antithetical to long distance competition.[3]

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[2] Sprint Comments at 1-2.

[3] *See Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area; Policy and Rules Concerning the Interstate, Interexchange Marketplace*, CC Docket Nos. 96-149 & 96-61, Report and Order, 12 FCC Rcd 15756, 15806 ¶ 88 (1997) ("*LEC Classification Order*") (noting that "the regulations associated with dominant carrier classification can dampen competition ..., would reduce incentives for competitive price discounting, ... might facilitate tacit coordination of prices, [and] ... can discourage the introduction of innovative new service offerings ...").

Sprint argues that BellSouth has "the ability to adversely affect long distance competition," insisting that BellSouth is "the largest mass market long distance carrier in its region" and is "rapidly expanding its share of the enterprise market ...."[4] However, Sprint cites no evidence in support of this argument, which ignores reality.

First, that BellSouth has had success in selling long distance services to its existing residential and small business customers says nothing about BellSouth's share of the mass market segment of the long distance market.[5] The mass market for long distance services includes all residential and small business customers, including those served by the established interexchange carriers, wireless carriers, as well as those using Voice over Internet Protocol ("VoIP"). Sprint has offered no evidence to suggest that BellSouth is "dominating" this segment of the market.

Second, the long distance market consists of much more than mass market customers, most notably enterprise customers that BellSouth has had limited success in serving. Although Sprint claims (again without factual support) that BellSouth is taking the long distance business of enterprise customers "at the expense of competitive long distance carriers," the facts are otherwise. In a filing in August 2004, the Ad Hoc Telecommunications Users Committee made clear that services to enterprise customers are provided almost exclusively by the established interexchange carriers -- such as AT&T, MCI, and Sprint – as well as "second tier companies"

[4] Sprint Comments at 9.

[5] Sprint Comments at 14 (noting a 53 percent penetration of BellSouth's mass market customer base for long distance services).

that include Broadwing, Qwest, Global Crossing, and Level 3.[6] According to the Ad Hoc Telecommunications Users Committee, "Enterprise customers do not often receive RFP responses from the BOCs ...," and "[t]heir role is typically limited to providing a subset of the most basic services (e.g., 'plain vanilla' outbound voice) rather than the most sophisticated data applications (e.g., frame relay or MPLS) or services with a national footprint."[7] Consequently, Sprint's claim about BellSouth's alleged "dominance" in the long distance market rings hollow.

This is particularly true given the Commission's prior conclusion that a BOC lacks the ability to engage in predatory or other anticompetitive behavior in the long distance market – a conclusion that Sprint does not bother to address. As the Commission noted eight years ago, because customers can shift their long distance traffic to another carrier, BOCs would not be able to "raise prices above the competitive level for their domestic interLATA services," particularly given the presence of established interexchange carriers, such as AT&T, MCI, and Sprint.[8] Furthermore, although Sprint complains about BellSouth's long distance customers being concentrated in its contiguous local service region, the Commission observed that this fact made it unlikely that a BOC "whose customers are likely to be concentrated in the BOC's local service region could drive one or more of these national companies from the market" or could later "raise prices in order to recoup lost revenues."[9] BellSouth's regional footprint has not changed

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[6] Letter from Coleen Boothby, Levine Blaszak Block & Boothby LLP, to Michael Carowitz, Competition Policy Division, Wireline Competition Bureau, FCC, WC Docket No. 02-112, CC Docket Nos. 00-175 & 01-337, at 1 (August 12, 2004).

[7] *Id.*

[8] *LEC Classification Order,* 12 FCC Rcd at 15811, ¶ 97.

[9] *Id.* at 15818-19, ¶ 107.

in the intervening years, and the Commission's analysis is fatal to Sprint's claims of BellSouth's alleged "dominance" in the long distance market.

Although Sprint also complains about BellSouth's alleged dominance in the exchange access market, such complaints have nothing to do with this proceeding or the relief BellSouth is seeking. As made clear in its Petition, BellSouth is not seeking a waiver of dominant carrier tariffing and price regulation rules as they relate to access services. Rather, BellSouth's waiver request regarding such rules extends only to the provision and offering of long distance services.[10] Thus, exchange access offered by BellSouth Telecommunications, Inc. ("BST") will continue to be subject to dominant carrier regulation, and all exchange access services will continue to be made available pursuant to tariff to all interexchange carriers.

Furthermore, Sprint ignores that Section 272(e), which remains in effect after sunset, effectively protects against discrimination in the provision of access services. Section 272(e)(1) ensures that BST will not provision exchange access service to itself or its affiliates faster than it provides the same service to a competitor. Section 272(e)(3) ensures a level playing field between interLATA competitors and BST if BST provides retail interLATA long distance by requiring BST to impute to itself (or charge its Section 272 affiliate) the same charge that it assesses to its interLATA competitors for exchange access. In short, and despite Sprint's claims otherwise, exchange access services will not be impacted by the waiver that BellSouth seeks.[11]

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[10] Petition at 9, n.17.

[11] The protections in Section 272(e) will guard against the "evils" Sprint predicts will befall the industry if BellSouth's Petition is granted. Sprint Comments at 12-13. For example, Section 272(e) would prohibit BellSouth from "discriminate[ing] in favor of its long distance operations" and "creat[ing] price squeezes to suppress competition." With respect to Sprint's concerns about the misallocation of costs and cross-subsidizing of services, such concerns are misplaced given that BellSouth is subject to price cap regulation – a regulatory regime under which cost allocation has no bearing on rates and cross subsidies have no meaning.

B. Section 272 Structural Separation Requirements Are Not Necessary To Protect Consumers Or Ensure Long Distance Competition.

In opposing BellSouth's Petition, Sprint seeks to portray the Section 272 structural separation requirements as a standard method of conducting business, likening them to the requirements "Sprint and independent ILECs have lived with ... for years."[12] However, Sprint is wrong, as the separate affiliate requirements to which independent ILECs are subject bear little resemblance to the structural and transactional requirements in Section 272(b) and the nondiscrimination safeguards in Section 272(c).

For example, under the Commission's rules, Sprint must offer in-region or international interexchange services through an affiliate, which must maintain books and accounts separately from and cannot jointly own transmission or switching facilities with its affiliated exchange company.[13] However, Sprint is not required to operate its affiliate "independently" from its exchange company or to have separate officers, directors, and employees, as BellSouth is required to do.[14] Indeed, although the affiliate must be a separate legal entity, Sprint has the flexibility to staff its affiliate with personnel housed in existing offices of its exchange company; it also could run its long distance operations as nothing more than a corporate division if it were reselling long distance services.[15]

Furthermore, unlike BellSouth, Sprint is not required to conduct all transactions with its long distance affiliate "on an arm's length basis with any such transactions reduced to writing

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[12] Sprint Comments at 4-5.

[13] 47 C.F.R. § 64.1903(a).

[14] 47 U.S.C. § 272(b)(1) & (3).

[15] 47 C.F.R. § 64.1903(b).

and available for public inspection."[16] Unlike BellSouth, there is no prohibition against Sprint, in its dealing with its long distance affiliate, from discriminating between that affiliate "and any other entity in the provision or procurement of goods, services, facilities, and information ...."[17] Indeed, there are no rules governing transactions or other dealings between Sprint and its affiliate, except to the extent the affiliate acquires services for which the exchange company is required to file a tariff, in which case the affiliate is subject to the same tariffed rates, terms, and conditions.[18]

Sprint and other independent ILECs enjoy considerably more flexibility in operating their long distance affiliates and are not hampered nearly to the same extent in conducting business as are BellSouth and the other BOCs under Section 272. For example, unlike BellSouth, Sprint can utilize VoIP gateways and softswitches to provide voice service to its customers, without developing a wholesale service offering that could be utilized by other carriers and without providing a complex multi-carrier wholesale operations interface capable of being used by other carriers.[19] Similarly, and also unlike BellSouth, Sprint can design and deploy a converged corporate-wide broadband network, without having to limit the information shared between its

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[16] 47 U.S.C. § 272(b)(5).

[17] 47 U.S.C. § 272(c)(1).

[18] 47 C.F.R. § 64.1903(a)(3).

[19] See Ex Parte Letter from Bennett L. Ross, Counsel for BellSouth, to Marlene Dortch, FCC (October 21, 2005) (outlining the negative impacts of Section 272 on BellSouth's efforts to deploy a network platform that would add VoIP gateway functions to other network components, including Digital Subscriber Line Access Multiplexers ("DSLAMs"), fiber-to-the-curb Host Digital Terminals, and Digital Loop Carrier Remote Terminals, which would be used in conjunction with a softswitch IP network and would allow customers to receive either VoIP service or Plain Old Telephone Service ("POTS") through the same serving arrangement).

long distance and exchange affiliates to ensure compliance with Section 272.[20] As the record in this case demonstrates, the artificial separation between local and long distance operations mandated by Section 272 causes BellSouth to struggle unnecessarily in its efforts to deploy IP and broadband services in a cost effective and timely manner – struggles that neither Sprint or the other independent ILECs must confront.

Sprint's assertion that Congress did not intend the Section 272 structural separation requirements "to be merely temporary" is false.[21] To the contrary, Congress clearly envisioned the temporary nature of the Section 272 safeguards, since it expressly provided that these safeguards would sunset automatically three years after the BOC is authorized to provide interLATA services.[22]

Equally false is Sprint's insistence that the Section 272 structural separation requirements should continue after sunset because, according to Sprint, BellSouth "has a record of abusing its market power."[23] For example, Sprint points to BellSouth's first section 272(d) audit, which

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[20] *Id.* (noting "the regulatory hoops" through which BST and BSLD must jump as part of BellSouth's corporate efforts to design and deploy a converged corporate-wide broadband network to ensure Section 272 compliance, including: (1) limiting the attendance of BSLD employees at converged network project meetings; (2) restricting the distribution and retention of documents containing BST or BSLD information; (3) restricting personal note-taking during project meetings; and (4) having to review all documents distributed to project team members – whether written or electronic – to ensure that BST or BSLD information has been redacted).

[21] Sprint Comments at 6-7.

[22] 47 U.S.C. § 272 (f)(1). Under this section, the Commission may extend this period by rule or order, but it has not elected to do so. Although Sprint criticizes BellSouth for assuming "that the mere passage of thirty-six months from its last grant of in-region long distance authority is sufficient to render [Section 272] rules unnecessary …," Sprint Comments at 8, this is not BellSouth's "assumption" but rather reflects congressional intent, since Congress obviously recognized that three years was a sufficient period of time to impose the extraordinary burdens inherent in operating under the Section 272 regime.

[23] Sprint Comments at 11.

Sprint claims demonstrated that BellSouth engaged in discrimination and other allegedly improper conduct. However, the audit report does not support such claims, and the "evidence" of discrimination is actually nothing more than false, unsupported allegations that AT&T made in the context of BellSouth's Section 272 audit.[24] Similarly, Sprint also points to the Consent Decree entered into by BellSouth in 2003, which involved allegations that BellSouth marketed and provisioned in-region interLATA services in states prior to being authorized to do so and that BellSouth had improperly rejected orders of CLEC end users seeking to obtain BellSouth long distance service.[25] Importantly, the Consent Decree did "not constitute either an adjudication on the merits or a factual or legal finding or determination regarding any compliance or noncompliance by BellSouth with the requirements of the Act or the Commission's rules or orders."[26] In addition, the incidents in question were discovered, self-reported, and voluntarily corrected by BellSouth. Thus, the Consent Decree cannot credibly be cited as evidence that BellSouth "has a record of abusing its market power," as Sprint seeks to do.

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[24] Although Sprint contends that "the Commission itself took no action on the report," Sprint Comments at 13, Sprint is mistaken, as the audit report led to a Notice of Apparent Liability for Forfeiture ("NAL") that was adopted in March 2004. *See In re: BellSouth Telecommunications, Inc. Apparent Liability for Forfeiture,* EB Docket No. 03-197, Notice of Apparently Liability for Forfeiture (released March 25, 2004). After a comprehensive and rigorous audit of all Section 272 requirements, the only issue the FCC deemed worthy of action was one regarding corporate structure. The NAL was not issued to remedy discrimination or improper steering of business to its affiliate, but rather as a result of a finding that BellSouth had allowed an affiliate to perform operations, installation, and maintenance ("OI&M") to BellSouth's long distance affiliate. No competitive harm resulted from this structure because the OI&M affiliate itself complied with all Section 272 requirements and was included within the biennial audit. BellSouth was assessed a monetary forfeiture of $75,000, and the OI&M restrictions were subsequently lifted.

[25] *In re: BellSouth Corporation*, EB-02-IH-0805, Order, 18 FCC Rcd 15135 (released July 17, 2003).

[26] *Id.* ¶ 9.

C. BellSouth Has Met The Standards For A Waiver, And The Commission Should Grant BellSouth's Petition, Notwithstanding Sprint's Claims To The Contrary.

According to Sprint, BellSouth has not met the standards for a waiver because it "has not shown that its circumstances are genuinely unique."[27] This contention ignores that Section 272 structural separation requirements will sunset for BellSouth in all nine states in its region in less than two months. By contrast, two of the other BOCs are not facing Section 272 sunset on a region-wide basis for nearly a year – SBC on October 15, 2006, and Qwest on December 3, 2006. BellSouth's ability to organize its local and long distance operations in the most efficient manner that best serves consumers in a post-sunset environment should not be put on indefinite hold until the Commission concludes the rulemaking it initiated more than three years ago regarding the sunset of the statutory requirements under Section 272.

Importantly, granting BellSouth's Petition would not require the Commission to "prejudge" the outcome of this rulemaking, as Sprint contends. The Commission could readily grant BellSouth a waiver of dominant carrier regulation without jeopardizing the Commission's ability to conclude a thorough assessment of the need for imposing any regulatory burdens on BOCs' provision of long distance service. Furthermore, and although Sprint refuses to acknowledge it, BellSouth simply does not occupy the same position in the market as other BOCs, such as SBC and Verizon, particularly if the mergers are approved. The Commission concluded in 1997 that a local carrier the size of BellSouth is unlikely to possess the ability to drive long distance competitors out of the market or raise prices.[28] This conclusion is even more

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[27] Sprint Comments at 3.

[28] *LEC Classification Order* , 12 FCC Rcd at 15818-19, ¶ 107, citing Daniel F. Spulber, *Deregulating Telecommunications*, 12 Yale J on Reg 25, 60 (1995) (other citations omitted).

valid today, given that BellSouth's local footprint has not expanded and BellSouth's local customer base continues to erode due to competition from other wireline providers, wireless substitution, and emerging technologies, such as VoIP. The Commission's granting of BellSouth's waiver request would not result in the resolution of regulatory issues in a "piecemeal fashion,"[29] but rather would simply give meaning to an issue resolved eight years ago.

Sprint's other criticisms of BellSouth's Petition also are misguided. For example, Sprint states that while seeking a waiver of tariffing requirements, BellSouth "does not say whether it would even file rate schedules, as even independent long distance carriers must do for the public ...."[30] However, BellSouth's Petition expressly addressed this issue, noting that "BST and BSLD would agree to be subject to Rules 61.19-61.25, which set forth the tariffing requirements for nondominant carriers" and which "should be made a condition of the granting of this waiver."[31]

Likewise, Sprint objects to the treatment of "interstate long distance revenue as 'regulated' for accounting purposes, despite its being deemed a competitive service," suggesting that it is not "in the public interest to allow integration of regulated and non-regulated revenues

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[29] Sprint Comments at 16. Sprint's true motivations are plainly revealed by its suggestion that the Commission should not take any action on the subject of BellSouth's Petition until the Commission resolves all outstanding proceedings that raise all "issues directly and indirectly related to BellSouth's Petition," including "pending rulemakings on special access performance standards and enforcement, special access rates for price cap LECs, and performance measures for UNEs and interconnection." Sprint Comments at 17 (citations omitted). Of course, this process could take months, if not years, which would conveniently allow Sprint to accomplish its ultimate objective of subjecting the BOCs to continued compliance with Section 272 structural separation requirements on a post-sunset basis, contrary to the intent of Congress and prior determinations of this Commission. *See* Sprint Comments at 2, n.7 (acknowledging that Sprint previously advocated "extending section 272 requirements past the sunset dates ...").

[30] Sprint Comments at 6.

[31] BellSouth's Petition at 9.

and costs ...."[32] The most that can be said about this objection is that Sprint is apparently confused about the Commission's accounting rules. First, the fact that long distance service is "competitive" does not mean that costs or revenues from that service are non-regulated. On the contrary, in its *Joint Cost Order,* the Commission observed that "[a]ll activities that are classified as common carrier communications for Title II purposes will be classified as regulated activities for purposes of our accounting rules."[33] Since any long distance services offered by BellSouth would be regulated under Title II, whether offered by a section 272 affiliate or on an integrated basis, these services should be treated as regulated for accounting purposes consistent with the *Joint Cost Order.*

Second, BellSouth is only seeking a waiver of the Commission's accounting rules to the extent those rules could be read to mandate that in-region, interexchange services provided by BellSouth on a more integrated basis be treated as nonregulated. Such a waiver would be unnecessary if the Commission agrees that all interLATA services offered after the sunset of Section 272 should be treated as regulated under its current rules. Sprint never explains the purpose served by its apparent desire to treat long distance revenues as nonregulated for accounting purposes, and such an outcome would be inconsistent with the Commission's *Joint Cost Order* and would otherwise serve no useful purpose.

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[32] Sprint Comments at 6.

[33] *In re: Separation of costs of regulated telephone service from costs of nonregulated activities; Amendment of Part 31, the Uniform System of Accounts for Class A and Class B Telephone Companies to provide for nonregulated activities and to provide for transactions between telephone companies and their affiliates,* CC Docket No. 86-111, Report and Order, 2 FCC Rcd 1298, 1307, ¶ 70 (1987) ("*Joint Cost Order*").

III. CONCLUSION

Notwithstanding Sprint's comments to the contrary, a waiver is warranted so that BellSouth (both BST and BSLD) can offer long distance services without being subject to the rules for which waiver is being sought. Waiving these rules is in the public interest and would allow BellSouth to operate more efficiently so that it can provide to consumers the benefits of increased competition. Accordingly, the Commission should grant BellSouth's Petition

Respectfully submitted,

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